

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SHELLEY L. MCPHERSON

Claimant

VS.

YORK UPG WICHITA

Self-Insured Respondent

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Docket No. 1,020,507

ORDER

Claimant appealed the November 6, 2006, Award entered by Special Administrative Law Judge John Nodgaard. A three-member panel of the Workers Compensation Board heard oral argument on February 16, 2007, in Wichita, Kansas.

APPEARANCES

Roger A. Riedmiller of Wichita, Kansas, appeared for claimant. Vincent A. Burnett of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant alleges she injured her left shoulder and neck working for respondent in a series of repetitive traumas beginning March 15, 2002, and each working day afterwards and in December 2003 and each working day after that date. In the November 6, 2006, Award, Judge Nodgaard, who was appointed to decide this claim in place of Judge Nelsonna Potts Barnes, found claimant sustained injury to her left shoulder resulting in a 10 percent functional impairment to her left upper extremity. Accordingly, Judge Nodgaard awarded permanent disability benefits for a 10 percent permanent disability under K.S.A. 44-510d.

Of note, in an earlier Order entered on August 15, 2006, Judge Barnes denied claimant's request to extend her terminal date in order to depose Dr. Murati. In addition,

as set forth in the Award Judge Nodgaard excluded medical reports that Judge Barnes had admitted at the regular hearing. Nevertheless, Judge Nodgaard accepted and utilized the opinions from those medical reports as Dr. Koprivica had repeated them during the doctor's deposition.

Claimant contends both Judge Nodgaard and Judge Barnes erred. Claimant argues Judge Barnes erred by admitting into evidence, without the doctor's supporting testimony, Dr. Murati's October 9, 2003, medical report that addressed claimant's functional impairment at that time. Claimant also contends Judge Barnes erred by denying her request to extend her terminal date to depose Dr. Murati. According to claimant, Dr. Murati's deposition became necessary once Judge Barnes admitted the doctor's October 2003 report. Furthermore, claimant argues she sustained a 14 percent or 15 percent whole person functional impairment for which she should receive permanent disability benefits under K.S.A. 44-510e. Accordingly, claimant requests the Board either to remand this proceeding to allow her to depose Dr. Murati or to exclude Dr. Murati's October 2003 report from the evidentiary record. In addition, claimant requests the Board to increase the November 6, 2006, Award.

Conversely, respondent contends the Award should be affirmed. Respondent argues Judge Barnes properly denied claimant's request to extend her terminal date to depose Dr. Murati. In addition, respondent argues that claimant's benefits should be limited to the schedules under K.S.A. 44-510d for a 10 percent disability to the left upper extremity at the shoulder level as that is the amount of increased impairment she sustained as a result of her alleged injury. In the alternative, should the Board determine Dr. Murati's report is not part of the evidentiary record, respondent requests the Board to remand this proceeding with directions to allow the doctor's testimony and any other evidence made necessary by the doctor's testimony.

Both parties are content with Judge Nodgaard's findings regarding the date of accident (January 5, 2005) and the average weekly wage (\$611).

The issues before the Board on this appeal are:

1. Should this proceeding be remanded to the Judge to allow the parties to obtain Dr. Murati's testimony regarding preexisting functional impairment?
2. Did Judge Barnes err by denying claimant's request to extend her terminal date to depose Dr. Murati?
3. What is claimant's present functional impairment?

4. What is the amount of preexisting functional impairment that should be deducted from claimant's award or present permanent disability as required by K.S.A. 44-501(c)?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

At the time of the June 2006 regular hearing, claimant had worked for respondent for nine years. In this proceeding, claimant alleges injuries to her left shoulder and neck from repetitive trauma she sustained working for respondent.

But this is not the first time claimant has been injured working for respondent. In 2002, claimant underwent bilateral carpal tunnel release surgeries and in November 2002 she underwent left wrist surgery for de Quervain's tenosynovitis. In addition, in April 2003 claimant had left shoulder surgery. Moreover, in July 2002, claimant filed documents with the Division of Workers Compensation in which she alleged a repetitive trauma injury to both upper extremities, shoulders, elbows, wrists, and *possibly* her neck. At that time claimant alleged her period of accident was March 1999 and each working day thereafter.

In that earlier workers compensation claim, which the parties concluded by Agreed Award dated December 19, 2003, claimant received benefits that equated to a 15.2 percent permanent partial general disability. The parties did not stipulate as to what parts of the body claimant injured, nor did they stipulate as to what functional impairment claimant sustained to each injured part. And although the parties agreed claimant was to receive benefits for a 15.2 percent permanent partial general disability, the Agreed Award does not indicate how that percentage was derived. The lack of detail regarding the nature and extent of claimant's injuries is in sharp contrast to the other stipulations that are set forth in the Agreed Award, which details to the penny the medical expenses respondent paid to 15 different individuals or health care providers.

Nevertheless, attached to the Agreed Award as exhibits were two medical reports that somehow played a part in forming the compromise settlement. The first report was from Dr. Robert L. Eyster, who provided an impairment rating for claimant's left shoulder. The second medical report was from Dr. Pedro A. Murati, who provided impairment ratings for both of claimant's upper extremities, her shoulder girdles and neck.

The earlier workers compensation proceeding, which was signed by Judge Barnes on December 19, 2003, was assigned docket number 1,005,195. That claim alleged, as indicated above, a date of accident of March 1999 and each workday thereafter. But the parties did not stipulate to the ending date for the period of accident, although for purposes

of computing the benefits the parties used March 14, 2002. The Agreed Award reads in its stipulations section, as follows:

The claimant met with personal injury by accident arising out of and in the course of her employment *on or about March 1999, and each and every working day thereafter.*¹ (Emphasis added.)

And in the award section, as follows:

WHEREFORE, AN AWARD OF COMPENSATION . . . for an accidental injury sustained *on or about March 1999, and each and every working day thereafter.* By agreement of the parties, March 14, 2002 is used for calculation purposes.² (Emphasis added.)

In contrast to the earlier workers compensation proceeding, in the claim presently before us claimant alleges she injured her left shoulder and neck from repetitive trauma at work from March 15, 2002, and each workday thereafter and from December 2003 and each workday thereafter.

From March 2002 to March or April 2003, claimant worked in respondent's air conditioning department, where she would alternate between making control boxes and running tests on air conditioning units. According to claimant, those two jobs required her to pull air conditioning units to her work station, repetitively reach overhead, and repetitively look either downwards to a table or upwards to a screen, all of which bothered her left shoulder and neck.

Before concluding her earlier workers compensation claim, as indicated above, claimant underwent a carpal tunnel release in June 2002 on her right wrist and in July 2002 she underwent the same surgery on her left wrist. In November 2002, claimant had another surgery on her left wrist for de Quervain's tenosynovitis. And in April 2003, claimant underwent her first left shoulder surgery.

After recovering from her April 2003 left shoulder surgery, claimant returned to work for respondent in the coil section where she laced coils and operated a coil machine that made the coils. Claimant testified that job bothered her left shoulder and neck from lifting, reaching overhead and looking downward. After approximately 30 days in that job, claimant moved to the heating lines. Accordingly, from June 2003 to June 2004, claimant would alternate between running tests on heating units and preparing the units to be

¹ R.H. Trans., Resp. Ex. 1.

² *Id.*

shipped. Again, those jobs bothered claimant's left shoulder and neck as she lifted parts, handled and turned units, repetitively reached overhead and repetitively looked upwards or downwards. In June 2004, claimant moved to a different line in the heating department but continued to alternate every other week between the same two jobs.

As she worked for respondent, claimant's left shoulder and neck symptoms progressively worsened. Claimant worked up until the December 2004 Christmas break and in early January 2005 underwent her second left shoulder surgery. Following that surgery, claimant was off work for approximately six weeks. When she was released to return to work without restrictions in March 2005, she returned to her regular job.

The January 2005 left shoulder surgery and related rest reduced claimant's symptoms. But since returning to work, the left shoulder and neck pain have returned and have even grown worse. Indeed, the day before the June 1, 2006, regular hearing, the company doctor modified claimant's job to change her job rotation from every other week to every two hours. According to claimant, the pain in both her left shoulder and neck has become severe since returning to work.

Claimant now seeks workers compensation benefits for her neck and left shoulder, which thus far has been operated twice. Other than ibuprofen, claimant has not received any medical treatment for her neck. In short, claimant requests permanent partial disability benefits based upon her functional impairment rating under K.S.A. 44-510e.

Claimant's functional impairment

The record contains three doctors' opinions regarding claimant's present functional impairment – Dr. George G. Fluter, Dr. Robert L. Eyster, and Dr. P. Brent Koprivica.

Dr. Fluter, who was retained by claimant's attorney, examined claimant in April 2005. The doctor, whose specialty is physical medicine and rehabilitation, found claimant's cervical range of motion was within functional limits although she reported "pain on the left side of the neck at end range with right lateral bending."³ Among other diagnoses, the doctor concluded claimant had chronic neck and left shoulder pain, myofascial pain affecting the neck, left upper shoulder and left scapular stabilizers, and status post left shoulder diagnostic arthroscopy with subacromial decompression and distal clavicle resection.

³ Fluter Depo. at 13.

Using the fourth edition of the *AMA Guides*,⁴ Dr. Fluter concluded claimant had a five percent whole person impairment for her cervicothoracic spine, a 10 percent impairment to the left upper extremity (six percent to the whole person) for the distal clavicle resection, and a nine percent impairment to the left upper extremity (five percent to the whole person) for shoulder range of motion deficits. The doctor also provided an impairment for the left median nerve entrapment at the wrist (six percent to the whole person) and the de Quervain's tenosynovitis at the left wrist (one percent to the whole person). The doctor also rated claimant's right upper extremity at 10 percent (six percent to the whole person) for the median nerve entrapment at the wrist. All ratings combined, the doctor found claimant had a 26 percent whole person functional impairment.⁵

Dr. Fluter then apportioned the impairment as follows: claimant had a 14 percent whole person impairment due to the injuries she sustained through December 2003 and a 14 percent whole person impairment for the injuries she sustained after December 2003.⁶ The doctor testified in pertinent part:

The above impairment rating is calculated based upon Ms. McPherson's current condition after March, 2002. Therefore, a portion of the impairment rating is related to her condition from March, 2002 to December, 2003 and a portion is related to her condition after December, 2003.

A permanent partial impairment to the whole body of 6 percent is related to the left distal clavicle resection, and a permanent partial impairment to the whole body of 5 percent is related to the left shoulder range of motion deficits; these combine to a permanent partial impairment to the whole body of 11 percent. In my opinion, one-half of the permanent partial impairment to the whole body related to DRE cervicothoracic spine impairment Category II can be attributed to chronic myofascial pain affecting the neck after December, 2003; therefore, there is a permanent partial impairment to the whole body of 2.5 percent which is rounded to the nearest whole number, 3 percent. This impairment is combined with the 11 percent noted previously, resulting in a total permanent partial impairment to the whole body of 14 percent related to Ms. McPherson's condition after December, 2003.⁷

⁴ American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

⁵ Fluter Depo., Ex. 2 at 5.

⁶ Fluter Depo. at 22, 23.

⁷ *Id.* at 17, 18.

Dr. Fluter acknowledged his five percent rating for claimant's neck is the same rating contained in Dr. Murati's October 9, 2003, medical report. Finally, Dr. Fluter admitted he did not know if the range of motion deficit in claimant's left shoulder was present after claimant's first shoulder surgery, which Dr. Eyster performed in April 2003.

Respondent presented the testimony of Dr. Eyster, who is a board-certified orthopedic surgeon. Dr. Eyster began treating claimant in November 2002 (after she had already undergone bilateral carpal tunnel release surgeries) for the de Quervain's tenosynovitis in her left wrist. In late November 2002, the doctor operated on claimant's left wrist to cut the tendon sheath. The doctor noted that in addition to her de Quervain's symptoms, claimant also was having problems with her left shoulder. In March 2003, claimant returned to Dr. Eyster's office with bilateral shoulder complaints, bilateral wrist pain and elbow pain. On April 22, 2003, Dr. Eyster performed the first of two arthroscopic surgeries on claimant's left shoulder.

In August 2003, Dr. Eyster rated and released claimant. The doctor's August 11, 2003, letter, which was attached to the Agreed Award mentioned above, indicated claimant had a four percent (which he would later modify to three percent) functional impairment to her left shoulder. Despite Dr. Eyster's testimony that he rated claimant based upon the *AMA Guides*, in reality he did not. Rather, the greater weight of the evidence indicates the doctor utilized his personal experience and that he did not consult the *Guides*.⁸

In September 2003, claimant indicated she was having symptoms in her neck and down into her left shoulder. Dr. Eyster recommended continued therapy and released her. Moreover, Dr. Eyster did not believe claimant's neck complaints in the fall of 2003 required either treatment or an impairment rating. The doctor testified, in part:

Q. (Mr. Riedmiller) So if I understand your testimony then as far as what you saw of the patient back in the fall of 2003, you didn't see any significant complaints of neck problems that you would either treat or rate her for at that time; is that correct?

A. (Dr. Eyster) Correct.⁹

Approximately one year later, in September 2004, claimant returned with increasing left shoulder pain. After an MRI and an injection, Dr. Eyster recommended a second arthroscopic procedure, which he performed in early January 2005. This time, however, the doctor performed a distal clavicle resection in addition to decompressing the shoulder joint. Although the doctor acknowledged the fourth edition of the *AMA Guides* rated a

⁸ Eyster Depo. at 25-27 and 29-30.

⁹ *Id.* at 34.

distal clavicle resection as comprising a 10 percent impairment, he disagreed with that opinion and rated claimant as only having a three percent impairment. Nonetheless, the doctor also testified that combining the 10 percent impairment provided by the *Guides* for a distal clavicle resection with a three percent upper extremity rating for the residuals related to the April 2003 left shoulder surgery would combine for a 13 percent impairment to the left shoulder.¹⁰

The third opinion regarding claimant's present functional impairment was provided by Dr. Koprivica. The doctor became involved in this matter after being requested by Judge Barnes to examine and evaluate claimant.

In the attorneys' joint letter to Dr. Koprivica dated September 12, 2005, the attorneys requested the doctor to provide his opinion as to whether claimant sustained a new injury and to what extent. The letter read in pertinent part:

Ms. McPherson's initial injury of March, 1999 and each and every working day thereafter was a repetitive injury to both upper extremities, including wrists, shoulders and neck. It was settled leaving future medical and the right to review and modification open at a 15.2% permanent partial impairment to the body as a whole. It was then alleged that Ms. McPherson suffered a new injury to her left shoulder and neck on March 11, 2002 and each and every working day thereafter, probably through the date of her second shoulder surgery of January 5, 2005.

Please give your expert medical opinion regarding the causation of Ms. McPherson's alleged new injury and specifically if you feel her current problems are a natural and probable consequence of the original injury, the natural aging process related to the prior Award injury, or represent a new and separate injury. If you determine that a new injury has occurred, please provide your opinion on any additional permanent partial impairment which has been sustained. Please apportion your rating between the two work related injuries, if appropriate.¹¹

Based upon the above letter, Dr. Koprivica assumed claimant's first repetitive injury concerned the period from March 1999 through March 11, 2002.

After examining claimant in January 2006 and reviewing her medical records, Dr. Koprivica concluded that before March 11, 2002, claimant developed bilateral carpal tunnel syndrome and left de Quervain's syndrome for which she had received the 15.2 percent permanent disability in the December 19, 2003, Agreed Award. The doctor also concluded that from March 11, 2002, through January 5, 2005, which is the date of claimant's second

¹⁰ *Id.* at 21.

¹¹ Koprivica Depo., Ex. 4.

left shoulder surgery, claimant developed chronic left shoulder impingement syndrome and chronic neck pain from a cervicothoracic strain related to repetitive trauma. In addition, the doctor found claimant had myofascial pain with an active trigger point in her left trapezius.

Assuming he was rating claimant for the impairment she sustained after March 11, 2002, the doctor concluded claimant had a 16 percent left upper extremity impairment (10 percent whole person) for the injuries to her left shoulder and a five percent whole person impairment to her cervicothoracic spine or neck. Accordingly, Dr. Koprivica concluded claimant sustained a 15 percent whole person functional impairment rating for the period between March 11, 2002, and January 5, 2005.

Changing the period of accident, however, changed claimant's functional impairment rating. Assuming December 19, 2003, (the date of the Agreed Award) as the starting date, then Dr. Koprivica believed claimant had sustained an additional 10 percent impairment to her left upper extremity and shoulder for the January 2005 clavicle resection. Moreover, assuming claimant had a five percent whole person impairment for her neck as of December 2003, then there has been no increase in the cervicothoracic impairment for the period ending January 5, 2005.

**Preexisting functional impairment, Dr. Murati's October 2003
medical report, and K.S.A. 44-501(c)**

In this claim, which was filed in December 2004, claimant alleges permanent injuries to her left shoulder and neck as the result of repetitive trauma. As indicated above, claimant alleges a period of accident from March 15, 2002, and each workday thereafter and/or from December 2003 and each workday thereafter. Also, as mentioned above, claimant and respondent entered into an Agreed Award in December 2003, in which they agreed as to the benefits claimant should receive for her earlier workers compensation claim.

The Workers Compensation Act provides that awards are to be reduced by the extent of the preexisting functional impairment when a preexisting injury has been aggravated. The Act reads in pertinent part:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. *Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.*¹² (Emphasis added.)

¹² K.S.A. 44-501(c).

And functional impairment is defined by K.S.A. 44-510e, as follows:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the *fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein. (Emphasis added.)

Consequently, respondent can reduce the award it is required to pay claimant in this claim if it is able to prove the extent, as measured by the fourth edition of the *AMA Guides*, of any preexisting impairment claimant had to her left shoulder or neck.

Dr. Eyster provided some information regarding the impairment in claimant's left shoulder and neck as of the fall of 2003. But Dr. Eyster did not feel claimant's neck warranted either treatment or a rating at that time. And Dr. Koprivica and Dr. Fluter's opinions regarding preexisting functional impairment were limited to the opinions, which they assumed were accurate but did not adopt as their own, expressed in Dr. Murati's October 9, 2003, medical report. Accordingly, absent the opinions expressed in that medical report respondent has no medical evidence to support its position that claimant had a five percent whole person functional impairment in her neck before she sustained the injuries that are subject to this claim.

Although the December 19, 2003, Agreed Award was admitted into evidence, that Award does not establish the extent of preexisting impairment. First, the parties did not stipulate or agree as to the functional impairment that claimant sustained to the different parts of the body that were allegedly injured. Second, the Agreed Award does not indicate how the 15.2 percent permanent partial general disability was determined or what parts of the body that disability rating represented. Third, the Agreed Award indicated the agreement was based upon a compromise of all issues. And fourth, the Kansas Court of Appeals has recognized that previous settlement agreements and previous functional impairment ratings used in those settlement agreements are not necessarily determinative of a worker's functional impairment for purposes of the K.S.A. 44-501(c) reduction.¹³

The Kansas Supreme Court has long held that settlement agreements and the disability percentages used in those settlements only control the rights and liabilities of the parties at the time of that settlement.

¹³ See *Leroy v. Ash Grove Cement Company*, No. 88,748 (Kansas Court of Appeals unpublished opinion filed April 4, 2003); *Watson v. Spiegel, Inc.*, No. 85,108 (Kansas Court of Appeals unpublished opinion filed June 1, 2001); *Mattucci v. Western Staff Services and Hobby Lobby Stores, Inc.*, Nos. 83,268 and 83,349 (Kansas Court of Appeals unpublished opinion filed June 9, 2000).

Prior settlement agreements regarding a claimant's percentage of disability control only the rights and liabilities of the parties at the time of that settlement. The rating for a prior disability does not establish the degree of disability at the time of the second injury. One hundred percent permanent partial disability is not an unalterable condition and a worker may be rehabilitated and then return to work. A worker who has once been adjudged 100 percent permanently partially disabled and has received or is receiving benefits, but thereafter returns to work and is again injured while working, is not precluded from receiving benefits for the loss of wages resulting from the subsequent injury's aggravation of his disability. A disabled worker may receive disability benefits more than once, but the worker may not pyramid benefits and receive in excess of the maximum weekly benefits provided by statute.¹⁴

When respondent offered Dr. Murati's October 9, 2003, medical report into evidence, claimant objected to its admission and continues to object on the basis that it violated K.S.A. 44-519, which provides:

Except in preliminary hearings conducted under K.S.A. 44-534a and amendments thereto, no report of any examination of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

Despite claimant's objection, Judge Barnes admitted Dr. Murati's October 9, 2003, medical report. As indicated above, Judge Nodgaard later ruled that medical report was not part of the record but he considered the opinions set forth in that report. Dr. Koprivica had repeated those opinions during Dr. Koprivica's deposition. It is clear, however, that Dr. Koprivica did not adopt Dr. Murati's opinions as his own regarding the extent of claimant's functional impairment. Instead, Dr. Koprivica testified it would be speculative for him to say how he would rate claimant's impairment as of October 2003.¹⁵ Likewise, Dr. Flutter did not rate claimant's preexisting impairment, other than the rough apportionment mentioned above.

In short, Dr. Murati's October 9, 2003, medical report was properly excluded from the record by Judge Nodgaard. Consequently, the record does not establish the extent of claimant's preexisting functional impairment.

¹⁴ *Baxter v. L. T. Walls Constr. Co.*, 241 Kan. 588, 593, 738 P.2d 445 (1987).

¹⁵ Koprivica Depo. at 50.

As indicated above, at oral argument before the Board claimant requested this claim be remanded for Dr. Murati's deposition if the October 9, 2003, medical report was to be considered part of the record. Similarly, respondent requested the Board to remand the claim for Dr. Murati's deposition should the Board find that medical record should be excluded from the record.

Considering the fact that respondent relied upon Judge Barnes' ruling that Dr. Murati's written report was part of the record, the Board feels that justice requires remand to the administrative law judge to permit the parties to obtain Dr. Murati's testimony regarding claimant's preexisting impairment.

Claimant's request to extend terminal date

Turning now to claimant's request to extend her terminal date, the Board concludes that such request should have been granted.

At the June 1, 2006, regular hearing, claimant learned that Dr. Murati's October 9, 2003, medical report was going to be part of the record. Claimant then returned to Dr. Murati for a follow-up examination, which was accomplished in late July 2006. Before claimant's August 3, 2006, terminal date expired, claimant's attorney sought a mutually acceptable deposition date from respondent or, in the alternative, an agreement from respondent to extend claimant's terminal date.

According to claimant's attorney, he was unable to obtain both the follow-up examination of claimant and Dr. Murati's deposition within his August 3, 2006, terminal date as Dr. Murati was out of town for part of the period in question.

The parties' attorneys are officers of the Court. Therefore, their representations should be taken as true unless there is some reason or evidence to question those statements and there is none shown. Accordingly, good cause existed to extend claimant's terminal date under K.S.A. 2006 Supp. 44-523(b) to obtain Dr. Murati's testimony, especially in light of the Judge's ruling at the regular hearing that admitted the doctor's October 9, 2003, medical report.

Based upon the above, this claim should be remanded to the Judge to reschedule the parties' terminal dates to allow both claimant and respondent to present Dr. Murati's testimony and to present whatever other evidence may be made necessary by Dr. Murati's opinions, as deemed appropriate by the Judge. Upon remand, the parties should also address as issues (1) the injuries that were settled by the December 19, 2003, Agreed Award and (2) the date upon which claimant's preexisting functional impairment should be measured for purposes of K.S.A. 44-501(c). Of course, in the alternative, the parties may address those topics by stipulation.

Based upon the above, the remaining issues are rendered moot.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁶ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest this decision is that of the majority.

AWARD

WHEREFORE, the Board sets aside the November 6, 2006, Award entered by Judge Nodgaard and remands this proceeding for further proceedings as set forth above. The Board does not retain jurisdiction over this claim.

IT IS SO ORDERED.

Dated this ____ day of March, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge
John Nodgaard, Special Administrative Law Judge

¹⁶ K.S.A. 2006 Supp. 44-555c(k).